(3)

No. 05-1623

IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. TILTON, Acting Secretary of the California Department of Corrections and Rehabilitation, *Petitioner*

v.

BRIAN A. BUCKLEY, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Brian Buckley, Respondent, opposes the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

Respondent adopts the statement of the Opinions Below as presented by Petitioner.

JURISDICTION

Respondent adopts the statement of Jurisdiction presented by Petitioner. Respondent's Opposition, following the obtaining of extensions of time, is timely.

RELEVANT STATUTORY PROVISIONS

Respondent adopts the statement of relevant statutory provisions submitted by Petitioner.

CUSTODY/BAIL STATUS

Appellee has been released from the Department of Corrections since January 13, 2003. An application for a stay of the Order granting the Habeas Corpus was made by Respondent to the United States District Court and denied after it was shown, amongst other factors, that Appellee had been a model prisoner for over fifteen years and *even the D.A. who had prosecuted him believed that he was suitable for parole*.

Appellee is currently living in Ventura County. He has maintained two jobs, obtained a drivers license, obtained an apartment, and has been evaluated by his parole officer as "exemplary" in her performance on parole.

A second application for a stay of the Order granting the Habeas Corpus was made by Respondent to this court on February 10, 2003. After extensive response by Appellee, including two addendums establishing his performance during his release, Appellant's motion to stay the judgment pending appeal was denied on March 13, 2003.

STATEMENT OF THE CASE

The Crime

There is no dispute that Brian Buckley and Curtis Fauber engaged in a robbery of a drug dealer, Thomas Urell. However, it is also without dispute that Mr. Buckley did NOT actively or passively participate in either the assault or the killing of the victim. In fact, it was absolutely clear that Fauber, and Fauber alone, suddenly and independently and without warning to or concurrence of Mr. Buckley, killed the victim without *any* participation by Mr. Buckley. This clear difference in conduct between the parties played a key part in the plea bargain which was later offered to Mr. Buckley; a plea bargain which is the foundation of this Petition.

The State Court Proceedings

Sometime after the killing, the Respondent was arrested for traffic violations and, at the direction of the Deputy District Attorney, Donald Glynn, questioned about the murder, without *Miranda* warnings. He was even promised that his statements could not be used against him. (D-4)[1]

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[1] Unless otherwise stated, Respondent's references are those from Petitioner's Appendix to the Petition for Writ of Certioari.

Relying on those assurances, Respondent gave a full statement incriminating not only Curtis Fauber, but another man, Christopher Caldwell, for another murder. The Respondent thereafter resolved his traffic tickets and released and co-defendant Fauber was arrested and charged with murder. The police used Respondent's statement to obtain a confession from Fauber. They proceeded in a capital case against Fauber, but their case fell apart in the middle of trial when Fauber's confession was declared inadmissable. (D-4).

On November 12, 1987, over a year after his initial statement, the government charged the Respondent with "Felony Murder", primarily to obtain his testimony against Fauber. The Respondent's testimony was crucial to Fauber's prosecution and the District Attorney's office had already invested a great deal of resources in obtaining a conviction against Fauber.

Prior to his indictment, Respondent had no criminal history - other than the traffic tickets mentioned above.

On December 17, 1987, Respondent was shown two documents detailing an offer by the prosecution to Respondent to settle his case. (This

was still early in the criminal proceedings; very shortly after the Preliminary Examination.)

The first document was a letter from Ventura County Deputy District Attorney Donald Glynn, the D.A. who's case against Fauber was falling apart. The letter, addressed to Respondent's counsel, offered to move to reduce his charge from first to second degree murder if Respondent testified truthfully as a witness against Caldwell and Fauber. (D-5; O-1).

The letter itself did not discuss sentence, however concurrent with the letter, Respondent was presented with a form prepared by the District Attorney entitled "FELONY DISPOSITION STATEMENT" which delineated the terms of Respondent's plea bargain (N-1). The form contains multiple paragraphs stating different terms and obligations, each with a small typed line on the left hand side of the paragraph for initials. (*Id.*)

Under the category "F. Consequences of Plea (Defendant to initial)" a typed paragraph reads: "I could be sentenced to the state prison for a maximum possible term of __ year(s)." **The District Attorney had written "15" into the blank space**. The Respondent initialed this paragraph. (*Id.*)

A separate paragraph about halfway down the page reads: "After I have served my prison term, I may be subject to a maximum parole period of ___." (*Id.* at p.39.) The District Attorney had written "life" into the blank space. The petitioner initialed this paragraph. (*Id.*)

Respondent was initially hesitant to enter into the plea bargain because he feared violent retaliation by Fauber, Caldwell, and/or other prison inmates if they found out he had cooperated with the prosecution.

Respondent's counsel told him that it was likely he would not even have to serve the maximum of fifteen years, but would probably be released after as few as seven and a half years in custody.

On December 17, 1987, Respondent signed both the letter and the Felony Disposition Form[2].

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[2] **D.A. INVESTIGATOR TROXEL'S TESTIMONY (obtained at the federal evidentiary hearing:**
On December 21, 1987, Larry Troxel, a District Attorney's investigator for over ten years as of that time, who was assigned to the investigation against Fauber and who had arrested Respondent on the traffic tickets and interviewed him a year earlier, re-interviewed Respondent. (The order confirming that an Evidentiary Hearing was held on July 31, 2002 is found at E-1. A partial transcript of testimony of the Federal Evidentiary Hearing [hereinafter ERT] is filed herein. See ERT 14-15, 70-71). During the interview, or perhaps during another meeting where Mr. Glynn and Respondent were present, the plea bargain offered by the prosecution was discussed. Based upon those discussion, Mr. Troxel believed that

On January 4, 1988, Respondent pled guilty to one count of second degree murder. (Exhibit M)[3] When the Respondent changed his plea to guilty the Felony Disposition Form and the letter containing the District Attorney's plea offer were attached and entered into evidence as the plea agreement. (M-4 and M-7).

Respondent would plead guilty to second degree murder and would receive a sentence of "15 years, tops", so long as he testified truthfully against Fauber. ERT 16. His understanding was that Respondent would not be required to serve "any time beyond 15 years." ERT16.

In fact, there was discussion that petitioner would probably "do less than the 15 years, perhaps half that time. ART 16-17. It was not Mr. Troxel's understanding that petitioner's sentence would be 15 years to life in jail. ERT17.

Mr. Troxel conveyed his understanding of Respondent's sentence to Respondent's mother, Jynx Schoaf. ERT 24. Mr. Troxel made it clear that his understanding of Respondent's sentence bargain was based on discussions with Mr. Glynn. ERT 20, 24.

Mr. Glynn had no doubt as to Mr. Troxel's integrity and believability. ERT 211.

[3] **ADVICE ON THE DAY OF THE PLEA**

On the day of the change of plea, prior to going to court, Petitioner met with his counsel, Mr. Troxel, and Mr. Glynn in the holding cell outside of the courtroom. ERT 72-73. The four men discussed whether or not petitioner should plead guilty. Petitioner was reluctant because he feared violent retaliation. ERT 57-58, 73-74. At that time, Petitioner was told either by his trial counsel or Mr. Glynn that he should focus on the "7 ½ years he would serve" if he accepted the plea; that he could get a degree in prison and start his own business after he was released; he would still be a young man. ERT 73-74.

During the change of plea proceeding the prosecutor reiterated what Respondent had agreed to when he signed the change of plea form when the prosecutor asked the Respondent whether he understood he could be "sentenced to state prison for **a maximum possible term of 15 years**." (M-5, emphasis added). He then asked if Respondent knew he would be "subject to a parole period of life." Respondent said "Yes." (*Id.*)

Soon afterwards the prosecutor said "*as I stated before and it's also contained in this Felony Disposition form*, that at the time of sentencing the people will ask the Court to declare the murder to be murder in the second degree with a maximum term of 15 years to life." (M-6).

It is impossible to observe from the Exhibits presented by Respondent to this Court - though the *handwritten* original of the document proves that during the change of plea hearing (which was eighteen days after the Respondent had signed the agreement) the prosecutor added certain handwritten portions to the agreement, initialed these additions, and signed the bottom of the amended agreement. One of the handwritten comments stated that "the People will move the court to declare the murder to be murder in the second degree with a maximum term of 15 years to life." (The miscreant language is at the very bottom of N-5.

The original shows that this language was added on the day of the hearing and NEVER shown to the Respondent. *Respondent did not know of or agree to this additional language.*

Respondent believed that the two statements, "maximum of fifteen years in prison" and "fifteen years to life," were synonymous as the prosecutor had prefaced the statement by stating he was only repeating what he had just said and what was in the disposition form.

Respondent attorney did not note any difference between the prosecutor's two statements or object.

The court did not modify the prosecutor's language or make any corrections or additions to the prosecutor's statements.

After the prosecutor had concluded his examination of Respondent the court asked for his plea. The Respondent pled guilty. (*Id.*)

Respondent performed his part of the plea bargain in every respect. First, he pled guilty to the charge, relinquishing his constitutional rights, including his right to a jury trial, to confront the evidence against him, and to require the State to prove the case against him beyond a reasonable doubt.

Thereafter, he ran the risk of retaliation and physical harm (a risk which the trial court took seriously and testified three times for the

prosecution: at the guilt-phase of Fauber's trial, at Caldwell's preliminary examination, and at the penalty-phase of Fauber's trial.

On January 7, 1988, Respondent testified on behalf of the prosecution in the guilt trial of Curtis Fauber. (Exhibit J). Respondent was cross-examined by Fauber's defense attorney and asked what the penalty for second degree murder was. He responded "15 years to life." (J-5).

On January 22, 1988, Respondent testified at Christopher Caldwell's preliminary hearing on the prosecution's behalf. The issue of his sentence was not raised.

On February 9, 1988, Respondent testified at the penalty phase of Curtis Fauber's trial. (Exhibit L) On cross-examination, Mr. Fauber's attorney sought to impeach petitioner by showing that Respondent had received a "sweet deal" in exchange for his testimony against Mr. Fauber:

Q: Mr. Buckley, you expect to be released from prison someday, don't you.

A: Yes.

Q: When do you think that's going to occur?

MR. GLYNN: Objection. This isn't relevant.

THE COURT: Overruled.

THE WITNESS: Seven and half years.

BY MR. FARLEY (FAUBER'S COUNSEL):

Q: Seven and a half years.

A: Yes

(Exhibit L-2).

Respondent's answer was made under oath just a month after he entered his plea of guilty. It reflected his understanding that he would receive a maximum sentence of 15 years in custody, pursuant to which - so long as he stayed out of trouble and worked in prison - he would be released in half of the fifteen years.

Mr. Glynn, who heard the Respondent testify, never made any attempt to clarify, explain or discuss petitioner's understanding about his sentence. [4]

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[4] At the federal evidentiary hearing, Mr. Glynn indicated that he was probably surprised by the testimony, but stated he was too busy with other activities to "correct" the Petitioner. ERT 215:11.

On March 1, 1988, (Exhibit K),[5] Respondent was sentenced on his case. The District Attorney advised the court that Petitioner had "complied with the terms of the negotiated disposition" and "has been a cooperative witness in all of the phases of the Fauber trial and he has testified at the preliminary hearing in the case against Christopher Caldwell." (K-2) (Both Fauber and Caldwell were ultimately convicted.)

Based upon the advice he received from his counsel, the statements he initialed in the Felony Disposition Form, the statements made by Mr. Glynn on the record regarding his sentence, and Mr. Glynn's failure to correct Respondent when he explained his understanding of his sentence while under oath at the Fauber trial, Respondent actually believed he would only be serving a maximum of fifteen years in custody, followed by a term of parole for life - a conclusion even the District Attorney felt was reasonable.[6]

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[5] Exhibit K's cover sheet is mis-dated. The parties have agreed that there was a typographical error made and that the correct date is "March 1, 1988" It is also mis-labeled in Petitioner's "Index to Appendix", when it is referred to has a Transcript of a "Plea" proceeding. It is actually a Transcript of a "Sentencing" proceeding.

[6] Even the District Attorney acknowledged, while under oath, that standing alone, the part of the Felony Disposition statement which stated that "I

Following his sentencing, Respondent continued to be concerned with his safety. The sentencing court found that "the Defendant's life [was] in danger in prison because of the testimony that he gave against his co-defendant in this case, and because of expected testimony in another murder case." (K-5). The court requested that the Department of Corrections give Respondent protective custody and "seriously consider" him for out-of-state transfer. (K-5)[7]

In 1995, Petitioner first became aware that the commitment of a maximum of 15 years in custody might not be met. At his initial

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understand that I could be sentenced to the state prison for a maximum possible term of 15 years" reasonably could be understood as a determinate sentence of 15 years maximum. ERT 157-158, 198-199.

[7] While in prison, Respondent was a model prisoner. He remained disciplinary free, with no incidents of violence during his incarceration, attending hundreds of hours of Alcoholics and Narcotics Anonymous. His prison psychiatric evaluations have opined that "he should be no significant danger to the community at large," and that "his violence potential is estimated to be no more than average relative to the average citizen in the community."

Before the United States District Court, the United States Court of Appeal panel and the *en banc* United States Court of Appeal, even the District Attorney and the Attorney General acknowledged that Respondent is suitable for release.

documentation hearing in 1995, Petitioner learned that the plea bargain agreement which he had signed setting out a term of a maximum of fifteen years imprisonment with a parole period of life would not be honored; instead Petitioner's sentence was fifteen years to life and Petitioner was finally informed what that meant.

The Federal Habeas Corpus Proceedings

Respondent adopts the statement of Petitioner in it's Petitioner regarding the Federal Habeas proceedings AND supplements it with the matters to which it has previously referred.

REASONS FOR DENYING THE PETITION

Certiorari should be denied because the Ninth Circuit opinion did not conflict with the court decision in *Ricketts v. Adamson*, 483 U.S. 1 (1987) and *Estelle v. McGuire*, 502 U.S. 62 (1991).

I. THE NINTH CIRCUIT DECISION WAS CORRECT WHEN IT DETERMINED THAT, "UNDER CLEARLY ESTABLISHED FEDERAL LAW", RESPONDENT HAS A DUE PROCESS RIGHT TO ENFORCE THE TERMS OF HIS PLEA AGREEMENT AND THAT THE CALIFORNIA COURTS WERE WRONG WHEN THEY FAILED TO EVALUATE HIS PLEA BARGAIN UNDER CONTRACT LAW, *AS REQUIRED BY CALIFORNIA LAW.*

The Ninth Circuit opinion in this case did not break new ground or over step the limitations of the AEDPA. It's decision was nothing more

than an enforcement of this Court's interpretation of the constitutional Due Process guarantee that a criminal defendant has a right to enforce the terms of his plea bargain.

Petitioner may state its argument in any manner it wishes, or cast aspersions on the Ninth Circuit's decision, but the analysis and decision in this case is very straightforward.

The Ninth Circuit held that under *Santobello v. New York*, 404 U.S. 257, 261-62 (1971) a criminal defendant has a due process right to enforcement the terms of his plea agreement. Petitioner concedes this point.

The Ninth Circuit then stated that *Ricketts v. Adamson*, 483 U.S. 1, 6 n.3 (1987) establishes that the interpretation of state court plea agreements is a matter of state law. Simply put, this means that the California courts are obligated to interpret Mr. Buckley's plea agreement under it's own law.

The Ninth Circuit went on to say that in California, negotiated plea agreements are a form of a contract and it is interpreted according to general contract principles, *People v. Shelton* 37 Cal4th 759, 767 [2006] and "according to the same rules as other contracts" *People v. Toscano*, 124 Cal. App.4th 340, 344 (2004) (citing other cases in California back to 1982).

Petitioner mis-interprets the Ninth Circuit decision. Petitioner states that the Ninth Circuit decision held that the U.S. constitution, as interpreted by this court, has held that "a state must apply contract law principles to interpret plea bargains". (Petition page 11) It did no such thing. It never once stated that federal law required that all state courts must interpret state plea bargains under contract law. It only stated that in California, the California courts have established that plea bargains must be interpreted by contract law and that the U.S. constitution guarantee of due process, as applied to the states in the 14th Amendment, requires that if California says it must interpret plea bargains under contract law, then Mr. Buckley had a right to expect that the California courts would do so in his case.

In essence, the Ninth Circuit said that California could, "within reason" interpret plea bargains under any standard it wanted, but when California decides that its laws require that California plea bargains be interpreted by California contract law, Mr. Buckley had a federal right to expect that California would abide by it's own law in interpreting his plea bargain. See *Hicks v. Oklahoma*, 447 U.S. 343 (1980), a defendant's "liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State."

Petitioner argues that the Ninth Circuit substituted its view on the process used by the California courts in interpreting Mr. Buckley's plea bargain. (Petition, page 11). But this is mistaken. The Ninth Circuit only required that California follow it's own laws, and when a California court interprets a plea bargain *without any consideration of contract law, which is required in California, as happened in this case*, then this Respondent's federal due process rights are being denied to him.

Petitioner never disputes the Ninth Circuit's conclusion that the holdings of *Shelton and Toscano* establish that California requires its plea bargains to be interpreted under contract law.

Petitioner never disputes the Ninth Circuit's conclusion that the Superior Court in Mr. Buckley's case NEVER applied contract law to the interpretation of his plea bargain.

Yet despite that, Petitioner argues that even though the Superior Court ignored all evaluation of contract law, and focused only on it's conclusion as to the state of mind of Mr. Buckley at the time he entered his plea, the state court did it's job.

Petitioner can assert this all it wants, but it's own argument concedes that the California courts didn't interpret Mr. Buckley's plea bargain as it's

own law requires it to do, and that this failure acted as a violation of Mr. Buckley's federal constitutional guarantees.

Petitioner attempts to muddy the water by referring to other type of foundational requirements of plea bargains under federal law. It refers to a number of cases which establish federal foundational requirements to a plea bargain (i.e., that the plea be knowing and voluntary). Respondent doesn't dispute that these requirements are part of any plea bargain, but what Petitioner fails to acknowledge, but what the Ninth Circuit clearly held, is that the *interpretation* of whether California plea bargains meet these requirements must be made under the process that California has, itself, established. Since California requires that it's plea bargains must be interpreted under California contract law, then Mr. Buckley had a federal right to expect that California courts would do so. When they entirely ignored it's own requirement, then the Ninth Circuit stated it had the right to interpret California law.

Petitioner says that this is a violation of *Estelle v. McGuire*, 502 U.S. at 68. It is not. The *Estelle* case found that where the state court addressed the question of the propriety of admitting a certain type of evidence under

state law and concluded it was admissible, it was improper for a federal court to replace that conclusion with it's own interpretation of state law.

That is NOT what happened in this case. Here the California court completely ignored the California law it was required to consider. When the California court reviewed Mr. Buckley's plea bargain, it completely ignored California's contract law, as it was required to do.

This case is more akin to *Hicks v. Oklahoma*, where the state court was found to have deprived a defendant of his state rights without consideration of the rights whatsoever.

In this court, the Ninth Circuit cautiously looked to the last reasoned state decision to see if it did, in accordance with California law, interpret the plea bargain as a contract and apply the three-step approach to interpreting contracts required by California law.

The Ninth Circuit properly found (A-11) that the Superior court made no mention of or reference to state contract law. The Ninth Circuit properly noted that the Superior Court also never discussed any of the terms of the plea agreement. Instead, it found, that the Superior Court addressed only whether Mr. Buckley was "expressly advised" and cites California cases dealing with "advisment".

But this is NOT an "advisement" issue. It is a contract issue, and this is not as a result of a finding of law of the Ninth Circuit, but a requirement under Californ[illegible] own laws.

The Ninth Circuit thereafter determined that the superior court failed to construe the terms of the plea agreement entirely.

Thereafter, the Ninth Circuit further cautiously proceeded to determine if it should take any action even in the face of the clear failure of the Superior Court to interpret it's own law. The Ninth Circuit (A-13), strictly adhering to the requirements of AEDPA, refused to take any action remediating the Superior Court error unless it could be established that there was prejudice from their error.

The Ninth Circuit thereafter made a cautious and painstaking evaluation of whether or not Mr. Buckley was prejudiced by the Superior Court's failure to consider contract law. It carefully looked at California's own three step contract requirement, as established *by California law*, (A-14).

California law requires that an interpretation of a contract begin by considering the written contract itself. In this case, where the written contract at one point states that the plea bargain calls for a determinate

sentence of 15 years followed by a life on parole, and at another point calls for a sentence of "15 to life", it properly concluded that the written contract was ambigious.

Under California law, when the written contract is ambiguous, the second step of contract analysis requires an evaluation of the language surrounding the written contract. Here, the language surrounding the contract is equally ambiguous. The words completely mirror the written contract.

Under California law, when the both the written contract and the words around them are ambiguous, it is required that the contract be interpreted against the person who created the contract, which in this case, is without dispute, the District Attorney.

As such the Ninth Circuit properly found that an interpretation of this plea bargain under California contract law would lead to an approval of Mr. Buckley's claim, and that therefore he suffered prejudice as a result of the Superior court's failure to follow it's own laws.

There is NOTHING ground breaking about this interpretation. It is NOT as the Petitioner asserts the Ninth Circuit's replacement of it's opinoin

over the opinion of the state court because the Superior Court never evaluated this plea bargain under it's own laws.

The Ninth Circuit thereafter found, that as a result of this error, undisputed federal law requires that the contract be "specifically enforced" and Petitioner concedes this conclusion.

Concluding Remarks

The law is supposed to be above political leanings. When a man's life hangs in the balance, the liberal or conservative bent of judge or a justice or a Circuit or a Supreme Court is not supposed to control what a federal statute says or how the Constitution is interpreted.

And there is shame on a prosecuting agency when it represents it's state government and it panders to the perceived political leanings of this Court by emphasizing the perceived political leanings of the 9th Circuit:

> "[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . ."
>
> *Berger v. United States*, 295 U.S. 78 (1935)

When the Petitioner in this case - the Attorney General, the prosecuting representative of sovereignty of the state of California - urges

this Supreme Court to render a ruling by saying ". . . that the Ninth Circuit has *once again* lost sign of the most elementary constraints on federal habeas corpus power . . . " it is doing nothing more than attempting to waive a "red flag of the Ninth Circuit's historical liberalism" before the perceived conservativism of this Court.

The Petitioner's smugness is particularly unfair, when it knows it is arguing for the incarceration of a person who it knows, deserves to be out of custody and it knows it has turned it's back on a method offered to it to allow this single person, this small man - Brian Buckley - to live his days in freedom instead of in a cement block behind barbed wire and electrified fences.

The Petitioner's unfairness manifests in two primary ways. First, because it repeatedly chooses to ignore the fact that Mr. Buckley set in motion this litigation almost ten years ago to gain his freedom and everyone, even the D.A. who prosecuted him completely believes he has earned his freedom - that he should be paroled, that seventeen years in prison was sufficient; that he is suitable for release.

At the conclusion of every oral argument in this case, the Attorney General has acknowledged that the prosecutor in the case and the

investigator for the prosecutor in the case acknowledge that Brian has earned the right to be released. A federal magistrate judge, a federal district judge, and seventeen judges of the 9th Circuit court of appeal, all have basically conceded that he should be out.

The parole agents who have supervised Brian Buckley in the five years since he's been released from prison and have called him a model parolee (I think their quote was, "Brian, if all my parolees were like you, I'd be out of a job") all agree he should be out.

The Attorney General itself has conceded that all the parties concur that Mr. Buckley should be out of jail, but it argues that he shouldn't be released "this way" (meaning through a Petition for a Writ of Habeas Corpus) but rather should gain his release through the Parole Board. Yet astoundingly, when the 9th Circuit offered the Attorney General to mediate this case - in effect, saying, forget the legal issues for the time being, let's get the parties together in our mediation unit and reach a fair decision for this one individual, this very same Attorney General stood up and objected. It argued it shouldn't be made to mediate the case.

Petitioner's unfairness almost manifests in the way it argues we should ignore the real facts surrounding the contract between the Petitioner

and Respondent in this case and all of the facts regarding the California Superior Court decision in this case. The Petitioner knows all to well that when the Superior Court judge made it's decision it did not have before it information the defendant, when fulfilling his bargain and testifying as a witness for the prosecution against two murderers, he believed his plea bargain called for a determinate sentence. It is so ironic that the D.A. who needed Mr. Buckley's help to prosecute two other defendants, who put Mr. Buckley at risk for his life by assisting the prosecution, NEVER once attempted to dis-abuse Mr. Buckley that he was (purportedly) under the wrong impression, i.e., that there is no such thing as a "15 year determinate term" in California, and that he was going to go to jail for 15 to life. His only excuse for failing to tell his star witness that he was risking his life for a promise that the D.A. could not keep was that he "was too busy" to tell him.

The Petitioner also knows that at the time the Superior Court judge was evaluating Mr. Buckley's state habeas petition, he did not have before him the knowledge that the D.A.'s own investigator, having heard the very same discussion of the issue as the defendant, also believed that the plea bargain called for the defendant to receive a 15 year determinate term.

Perhaps most dis-ingenuously, the Petitioner argues that the federal courts shouldn't be able to consider this evidence, because it only came to light during a federal evidentiary hearing, but it also knows that if the Superior Court judge didn't know this information, Petitioner *itself* did, yet chose to *withold* this information from the Superior Court judge *at the time of the hearing in the Superior Court.*

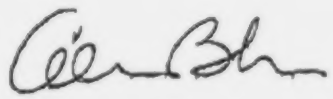
One can only wonder of the Petitioner was again "too busy" to tell the Superior Court judge the full and true facts of the case.

CONCLUSION

For the reasons stated above, Petitioner respectfully urges this Court to deny the Petition.

DATED: March 1, 2007

RESPECTFULLY SUBMITTED,



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